

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MATTHEW A. HYNEMAN,)	
)	CASE NO. C13-0669-JLR-MAT
Plaintiff,)	
)	
v.)	
)	REPORT AND RECOMMENDATION
CAROLYN W. COLVIN, Acting)	RE: SOCIAL SECURITY
Commissioner of Social Security,)	DISABILITY APPEAL
)	
Defendant.)	
_____)	

Plaintiff Matthew A. Hyneman proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be reversed and remanded for additional administrative proceedings.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1957.¹ He did not graduate from high school, and has not received a GED. (AR 49.)

Plaintiff filed applications for DIB and SSI on October 19, 2010, and April 6, 2011, respectively, alleging a disability onset date of February 5, 2007. (AR 219-20, 226-32.) The applications were denied, initially and on reconsideration. (AR 133-39, 141-60.) Plaintiff timely requested a hearing. (AR 161-62.)

On March 5, 2012, ALJ M.J. Adams held a hearing, taking testimony from Plaintiff and a vocational expert. (AR 45-78.) On March 22, 2012, the ALJ issued a decision finding Plaintiff not disabled. (AR 25-39.) Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review on February 20, 2013 (AR 1-7), and Plaintiff appealed this final decision of the Commissioner to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 not engaged in substantial gainful activity since February 5, 2007, the alleged onset date. (AR
02 27.) At step two, it must be determined whether a claimant suffers from a severe impairment.
03 The ALJ found Plaintiff's cervical and lumbar degenerative disc disease, affective disorders,
04 anxiety disorders, and substance addiction disorders to be severe impairments. (AR 27-29.)
05 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
06 found that Plaintiff's impairments did not meet or equal the criteria of a listed impairment.
07 (AR 29-31.)

08 If a claimant's impairments do not meet or equal a listing, the Commissioner must
09 assess residual functional capacity (RFC) and determine at step four whether the claimant has
10 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
11 performing light work, able to lift and/or carry up to 20 pounds occasionally and up to 10
12 pounds frequently. He can stand, walk, and/or sit with normal breaks up to six hours each out
13 of an eight-hour workday. He can occasionally climb, stoop, and crawl, and frequently
14 balance, kneel, and crouch. He must avoid concentrated exposure to extreme cold, vibration,
15 and hazards such as machinery and heights. He can understand, remember, and carry out
16 simple instructions required of unskilled work, and he has average ability to perform
17 sustained work activities in an ordinary work setting on a regular and continuing basis within
18 customary tolerances of employers' rules regarding sick leave and absence. He can make
19 judgments on simple work-related decisions and can respond appropriately to supervision and
20 co-workers, and can deal with changes within a stable work environment. He cannot
21 frequently encounter the general public, but incidental contact is not precluded so long as the
22 public is not a part of the work process. (AR 32.) With that assessment, the ALJ found at

01 step four that Plaintiff could not perform his past relevant work. (AR 37.)

02 If a claimant demonstrates an inability to perform past relevant work, the burden shifts
03 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make
04 an adjustment to work that exists in significant levels in the national economy. After
05 considering the testimony of the vocational expert, the ALJ found Plaintiff capable of
06 performing representative occupations such as mail clerk, marker, and library page. (AR 38-
07 39.)

08 This Court's review of the ALJ's decision is limited to whether the decision is in
09 accordance with the law and the findings supported by substantial evidence in the record as a
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which
14 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff alleges that the ALJ's decision should be reversed and remanded for
17 additional proceedings because it is erroneous in three ways: (1) evidence was inadvertently
18 omitted from the administrative record due to counsel's oversight; (2) the ALJ's adverse
19 credibility determination is not based on clear and convincing reasons; and (3) the ALJ's RFC
20 assessment fails to account for all limitations identified by Matthew Bressie, M.D.; Sandrine
21 Ducos, PA-C; and Romalee Davis, M.D. The Commissioner contends that the ALJ's decision
22 is supported by substantial evidence and free from legal error.

Late-Supplied Evidence

During the underlying administrative proceeding, Plaintiff requested documentation from Pacific Medical Centers, some of which was submitted for inclusion in the record and some of which was not submitted for inclusion. Plaintiff's counsel subsequently realized that not all of the updated records had been submitted, and attached those omitted records (Pacific Medical Centers treatment notes from November 2011 to February 2012) to the opening brief. *See* Dkt. 12, Ex. A (hereinafter "the late-supplied evidence"). According to Plaintiff, this case should be remanded under sentence six of 42 U.S.C. § 405(g), to allow for reconsideration of the ALJ's decision in light of the late-supplied evidence.² Dkt. 12 at 3.

The Commissioner summarily states that a sentence-six remand is not necessary because the new evidence is not material and no good cause exists for Plaintiff's failure to offer the evidence in the earlier proceeding. Dkt. 13 at 5. The Commissioner provides no analysis of either of those factors, and Plaintiff urges the Court to consider that failure a concession that Plaintiff's position has merit. Dkt. 14 at 2. Though the Commissioner's lack of substantive response is less than helpful, the Court declines to construe the Commissioner's briefing as a concession in this case because Plaintiff has cited no authority to support his argument that counsel's oversight in submitting evidence could equate to good cause for their late disclosure. *See* Dkt. 12 at 5, Dkt. 14 at 2. Ninth Circuit authority indicates that "good cause" for a late disclosure exists when the evidence was unavailable earlier, or where the evidence was available but counsel's diligent efforts to obtain it were not successful until after

² Given that this matter should be remanded for other reasons explained *infra*, Plaintiff's request for a sentence-six remand is moot. Dkt. 14 at 11-12. On remand, Plaintiff is entitled to provide new evidence relevant to the period under consideration on review.

the hearing. *See Mayes v. Massanari*, 276 F.3d 453, 462-63 (9th Cir. 2001); *Navarro v. Astrue*, 2010 WL 1880863, at *6 (May 10, 2010). Counsel's oversight in this case does not meet the standard for good cause. Accordingly, a sentence-six remand is inappropriate. *See Mayes*, 276 F.3d at 463 (holding that even if the new evidence is material, if there is no good cause for the claimant's failure to submit the evidence earlier, then a district court does not abuse its discretion in refusing a sentence-six remand).

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Comm'r of Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

In this case, the ALJ provided two³ reasons to discount Plaintiff's credibility:

³ The Commissioner argues that the ALJ also cited inconsistent daily activities as a reason to discount Plaintiff's credibility. *See* Dkt. 13 at 8 ("In this case, the ALJ noted Plaintiff engaged in many activities that belied his alleged limitations due to his mental and physical limitations."). The Commissioner does not identify where in the decision the ALJ so noted, and the Court's review of the decision does not comport with the Commissioner's description. The Commissioner suggests that "the ALJ clearly explained [how] these activities contradicted Plaintiff's assertion that he could not lift more than 10 pounds 'for a short time' and could walk about half a block before he would need to stop and rest," but the portion of the decision cited as support does not actually contain a description of Plaintiff's activities nor an explanation of how those activities contradict his allegations. Dkt. 13 at 8 (citing AR 35-37). The ALJ did describe the "mild restriction" in Plaintiff's daily activities in his step-three findings, but did not suggest there that Plaintiff's self-reported daily activities undermined his credibility. (AR 30.) The ALJ's passing reference to daily activities that are "contrary to a finding of total disability" (AR 37), without any indication of which activities he had in mind nor which

01 inconsistent medical evidence, and lack of treatment for allegedly severe symptoms. (AR 33-
02 35.) The ALJ noted that although Plaintiff claimed to experience disabling neck and back
03 pain, objective testing did not corroborate those allegations and Plaintiff failed to seek
04 “ongoing treatment for those impairments” post-May 2010. *Id.*

05 Plaintiff correctly notes that lack of corroboration in the objective medical record
06 cannot alone serve as a basis for discounting a claimant’s allegations of pain. Dkt. 12 at 8;
07 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (“While subjective pain testimony
08 cannot be rejected on the sole ground that it is not fully corroborated by objective medical
09 evidence, the medical evidence is still a relevant factor in determining the severity of the
10 claimant’s pain and its disabling effects.”).

11 Thus, the propriety of the ALJ’s adverse credibility determination relies on the
12 remaining factor: lack of treatment. The ALJ’s analysis of this issue is encapsulated in one
13 sentence: “Of note is that in spite of [Plaintiff’s] allegations of disabling neck and back
14 symptoms, the record contains essentially no records showing ongoing treatment for those
15 impairments following Dr. Kopp’s May 2010 evaluation.” (AR 35.) Plaintiff argues that this
16 characterization of the record is inaccurate,⁴ because the record contained a June 2011

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18 allegations are undermined by those activities, is not sufficiently specific as to be considered clear and
19 convincing. *See Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (“General findings are insufficient;
20 rather, the ALJ must identify what testimony is not credible and what evidence undermines the
claimant’s complaints.”) Accordingly, to whatever degree the ALJ discounted Plaintiff’s credibility in
light of inconsistent daily activities, such a finding is erroneous due to its lack of specificity.

21 4 Plaintiff also argues that the late-supplied evidence further reveals that he sought treatment
22 for neck and back pain, but emphasizes that even the record available to the ALJ was inconsistent with
his characterization. Dkt. 12 at 10. Although Plaintiff also notes that he testified at the hearing that he
had a steroid injection in his neck just a few days earlier (AR 57-58), this testimony does not
necessarily establish that he had *ongoing* treatment for his impairments. Dkt. 14 at 5.

01 medical opinion from a treating provider indicating that Plaintiff established care in March
02 2011 and had been seen six times since then for back and neck pain, among other diagnoses.
03 *See* AR 794-98.

04 The Commissioner does not address this evidence, but instead simply reiterates the
05 ALJ's finding and posits that lack of treatment "is a valid reason to discredit pain testimony."
06 Dkt. 13 at 9. This undisputed contention is not helpful to the Court's analysis, because the
07 Commissioner fails to address the Plaintiff's specific contention that the record actually
08 contains evidence of treatment overlooked by the ALJ. Because it appears that Plaintiff did in
09 fact seek ongoing treatment subsequent to May 2010, the Court cannot find that the ALJ's
10 finding with regard to lack of treatment is supported by substantial evidence in the record.
11 Accordingly, on remand, the ALJ shall reconsider Plaintiff's credibility.

12 Medical Opinions

13 Plaintiff assigns error to the ALJ's assessment of three medical opinions: the June
14 2011 opinion of treating physician Dr. Bressie, the December 2010 opinion of consultative
15 psychiatrist Dr. Davis, and the February 2011 opinion of DSHS examiner Ms. Ducos. The
16 ALJ assigned no weight to the opinions of Dr. Bressie and Ms. Ducos, and some weight to the
17 portions of Dr. Davis's opinion addressing mental symptoms and limitations. (AR 35-36.)
18 An ALJ must provide specific and legitimate reasons to discount a contradicted acceptable
19 medical source opinion, and germane reasons to discount an opinion provided by a non-
20 acceptable medical source. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996); *Molina v.*
21 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

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01 Dr. Bressie

02 The ALJ rejected Dr. Bressie's opinion (AR 794-98) because (1) it relied on Plaintiff's
03 non-credible self-report, (2) his findings did not include neurological testing nor do they
04 support his opinions regarding severe limitations, and (3) it is inconsistent with other evidence
05 of record showing negative straight-leg raises and "few neurological findings in the upper and
06 lower extremities." (AR 35.)

07 The ALJ's first reason (reliance on non-credible self-report) cannot be affirmed in
08 light of the Court's finding that the ALJ's credibility findings are deficient. The ALJ's
09 second reason (lack of citation to findings, particularly neurological findings, to support
10 opinions) is legitimate, however, because Dr. Bressie's objective findings (range-of-motion
11 limitations, findings regarding tenderness and spasm) do not directly support the opinions
12 contained in his questionnaire. *See* AR 794. Although Plaintiff points to neurological
13 findings indicated elsewhere in the record and in the late-supplied evidence, Dr. Bressie did
14 not cite that evidence in his opinion nor refer to any objective findings that would support his
15 opinions, and the ALJ was entitled to discount his opinion on that basis. *See Thomas*, 278 at
16 957.

17 The ALJ's third reason (inconsistent evidence) is problematic, because while the
18 record does contain treatment notes from 2008 and 2010 showing negative straight-leg raises
19 and mostly unremarkable neurological findings in Plaintiff's arms and legs (AR 537-45, 583-
20 97), it also contains some of the results of an April 2011 MRI conducted on Dr. Bressie's
21 referral, which indicates moderate to moderately severe neural foramina stenosis. (AR 804.)
22 Although Dr. Bressie's treatment notes discussing the MRI results were not before the ALJ,

01 but were instead included in the late-supplied evidence, the record before the ALJ nonetheless
02 put him on notice that Plaintiff underwent the April 2011 MRI and that Dr. Bressie's
03 references to cervical and lumbar radiculopathy (AR 794) were informed by the MRI results.
04 Thus, it appears that the ALJ's impression of the record does not account for the April 2011
05 MRI findings, which were more thorough and updated than the earlier medical evaluations
06 conducted for purposes of Plaintiff's Department of Labor & Industries (L&I) claim.
07 Accordingly, because the ALJ's finding that Dr. Bressie's opinion was inconsistent with the
08 record is based on an incomplete view of the record, this reason is not a legitimate basis on
09 which to discount Dr. Bressie's opinion.

10 Because two out of three reasons provided by the ALJ for discounting Dr. Bressie's
11 opinion are not legitimate, the ALJ erred in assigning no weight to Dr. Bressie's opinion and
12 shall reconsider it on remand.

13 Ms. Ducos

14 The ALJ assigned no weight to Ms. Ducos's opinion for the same reasons he rejected
15 Dr. Bressie's opinion. (AR 35.) Again, the first reason (reliance on non-credible self-report)
16 is not legitimate in light of the ALJ's invalid credibility determination. As to the second and
17 third reasons (lack of citation to findings, particularly neurological findings, to support
18 opinions, and inconsistency with L&I reports), Ms. Ducos does refer to specific evidence as a
19 basis for her opinions, namely the L&I reports and medical records from treating physician
20 Daniel Lazar. (AR 636.) The ALJ noted that the L&I reports contain findings (negative
21 straight-leg raises and unremarkable neurological findings) that can be reasonably construed
22 as inconsistent with Ms. Ducos's opinion, however, which is a germane reason to discount the

01 opinion. Thus, the ALJ did not err with respect to Ms. Ducos's opinion.

02 Dr. Davis

03 The ALJ assigned some weight to Dr. Davis's opinions regarding Plaintiff's
04 psychological symptoms and limitations, but rejected her opinion that as opposed to mental
05 limitations, "[i]t is [Plaintiff's] physical limitations and his sensitivity to pain and discomfort
06 that keep him from being able to work." (AR 705.) The ALJ noted that as a psychiatrist, Dr.
07 Davis was not qualified to render an opinion regarding Plaintiff's physical limitations. (AR
08 36.)

09 The ALJ's reasoning is specific and legitimate, because Dr. Davis's opinion regarding
10 Plaintiff's physical limitations was both outside her area of specialization and unsupported by
11 her opinion, because she did not perform any physical testing. *See, e.g., Allison v. Astrue*, 425
12 Fed. Appx. 636, 639 (9th Cir. 2011). Thus, the ALJ did not err with respect to Dr. Davis's
13 opinion.

14 **CONCLUSION**

15 For the reasons set forth above, the Court recommends that this matter be REVERSED
16 and REMANDED for further administrative proceedings. On remand, the ALJ shall
17 reconsider Plaintiff's credibility and Dr. Bressie's opinion in light of all the evidence of
18 record, including any additional evidence supplied on remand.

19 DATED this 18th day of October, 2013.

20 

21 Mary Alice Theiler
22 Chief United States Magistrate Judge